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Promulgation of Finabel Study ETG.1.R (2014)

“The Handling of Detainees”

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INTRODUCTION

The nature of contemporary operations – such as in Afghanistan, Iraq or Mali - reflects the complexities of their environment, particularly in the field of terrorism and insurgency and the reaction of states in combating those forms of violence. Transnational actors expanding their scope to more than one state are present on the battlefield and are part of the complexity.

Detention as such is recognized as a necessary, and, depending on the mandate and legal basis for the operation, lawful and legitimate tool in the context of achieving the objectives of international military operations. However, the handling (and transfer) of detainees in international military operations especially in the context of non-international armed conflict solutions and peace operations presents particular challenges in balancing operational international human rights law (where applicable) and international humanitarian law requirements. In meeting this challenge, many good practices have been developed during recent international military operations.

The aim of this document is to provide military commanders with an overview of best practice for the handling of detainees in international military operations in the context of non-international armed conflict situations and peace operations building upon the Copenhagen Process, Principles and Guidelines¹

¹ The working party has referred to the Copenhagen Process, Principles and Guidelines and to the Chairman’s comments in the development of this Document.

This document is not intended to be a legally binding document nor to create new legal obligations. Human rights, international humanitarian law and national regulations as well as the ROE and the mandate still stand over this study and have to be respected.

I. DEFINITION

For the purpose of this document, detainees are individuals who have been deprived of their liberty for reasons related to an international military operation. A person may be detained for a number of different reasons, including posing a threat to the security of the international military operation, for participating in hostilities, for belonging to an enemy organised armed group, for his or her own protection, or if the person is accused of committing a serious criminal offence. The reasons for detention must be linked to the international military operation.

Deprivation of liberty in this context means the exercise of physical control over an individual. Factors which may indicate that this applies may include physical restraint to prevent a person leaving the scene of an incident or alleged crime or the exercise of physical control over an individual for an extended period of time. A person who has been subject to temporary restriction of liberty at places such as checkpoints or roadblocks may not necessarily have been detained.

II. LEGAL BASIS

Individuals may only be deprived of their liberty when there is a legal basis to do so. The mandate for the international military operation may provide the basis for detention activities. In addition, the applicable legal framework will govern detention activities.

III. HANDLING OF DETAINEES

3.1 General points

All individuals detained or whose liberty is being restricted will in all circumstances be treated humanely and with respect for their dignity without any adverse distinction founded on race, colour, religion or faith, political or other opinion, national or social origin, sex, birth, wealth or other similar status. Torture, and other cruel, inhuman, or degrading treatment or punishment is prohibited.

3.1.1 Use of force.

The use of force to facilitate detention should be governed by regulations and instructions such as ROE, rules for the use of force, or other relevant laws and orders that deal with the use of force during international military operations.

Physical force against detainees is not to be used unless necessary. Examples of situations when physical force may be necessary include when the detaining personnel are acting in self-defence or in defence of others, where the potential detainee is resisting detention, or where strictly necessary to maintain security and order in the detention facility. In circumstances where physical force is necessary, it must be proportional to the threat or other legitimate military necessity and, where circumstances permit, graduated.

In compliance with the general principles of treating detainees humanely, the use of physical force is not to be used as a physical punishment.

3.1.2 Excess of the use of force.

Use of physical force against detainees should be reported and any reasonable suspicion of inhumane treatment should be investigated appropriately. Where a detainee is injured because of the physical force used against them, the detainee must receive adequate medical assistance and care.

3.1.3 Medical treatment.

Wounded and sick detainees should be provided with the medical treatment required for their medical condition. There must be no distinction among wounded or sick detainees as regards access to medical treatment other than medical ones.

3.1.4 Detention process.

In each phase of the detention process, different actions are required in order to ensure that the appropriate standards of treatment are provided to detainees. The detention process will therefore be addressed in this Document on a chronological basis, beginning with the point at which an individual is deprived of their liberty, transfer of the individual to the detention facility, treatment while held at the detention facility through to the point of transfer or release.

3.2 At the scene.

3.2.1 Information.

- 1) The detention process begins with the deprivation of liberty. The individual must be informed promptly of the reasons of their detention in a language they understand.
- 2) Operational necessities or resource constraints, such as force protection or the availability of interpreters, may sometimes make it

difficult to advise the detainee of the specific reasons for their detention at the point of capture.

- 3) The term “promptly” is used to suggest that detainees should be advised of the reasons for detention in a reasonable time, taking into account other essential tasks and resource limitations that might affect the detaining authorities’ ability to inform the detainee.

3.2.2 Search.

Detention may be justified by a prior search, or a search may be conducted following detention for security reasons. In any case, the following procedures apply:

- 1) The search should be conducted by a person of the same gender unless absolutely unavoidable.
- 2) Where this is unavoidable, another member of the armed forces, if possible someone more senior to the individual conducting the search, should supervise it.
- 3) Intimate searches must not be carried out under any circumstances at the point of capture.
- 4) The person conducting the search is to:
 - Maintain a record of the search;
 - Ensure the presence of a witness;
 - Explain to those subjected to the search the reason for it. Where this cannot be done, the explanation should be provided as soon as possible.

3.2.3 Belongings.

- 1) Detainees may retain their personal belongings (clothing, personal effects and religious items) provided they do not represent a threat to their security or that of others. Belongings necessary for personal protection (eg. helmets, respirators and flak jackets) may also be retained by them.
- 2) Belongings with a military value (eg. electronic devices, CIS equipment and weapons) should be removed. These must be recorded.

3.2.4 Identity of the detainees.

Any serviceperson may speak to a detainee to establish identity, status and age. If the detainee is unwilling to speak, only tactical questioners may engage with them. Tactical

questioning should be carried out as soon as possible but only by specially trained personnel. In any case, no coercion may be used in order to obtain information.

3.2.5 Registration

Detainees are to be initially registered by the detaining authority at the point of capture with sufficient information to enable them to be tracked to the holding facility where full registration will take place.

3.2.6 Food, drinking water and shelter

Food, drinking water and shelter from the elements should be provided as required at the scene within means and capabilities. Detainees will receive as a minimum provision to an equivalent standard to the troops carrying out the detention.

3.3 Evacuation.

3.3.1 General.

Detainees should be transferred as soon as possible to a holding facility. Depending upon the length of the journey to be undertaken to the holding facility, consideration should be given as to whether food and water are required to be provided. Consideration should be given in view of the length of the journey, the condition and the nature of the detainees as to whether transport is required for this movement.

3.3.2 Deprivation of sight or hearing.

Deprivation of sight or hearing and the application of restraints will only be permitted when they are strictly necessary. Sensory deprivation or the application of restraints to detainees would amount to ill treatment if used as a form of punishment or to inflict suffering. However, application of restraints and sensory deprivation may not in itself amount to ill treatment as such if the purpose is to ensure the safety of the detainee or of others. For example, using earmuffs during transportation to protect a detainee's hearing will not amount to ill treatment. Similarly, the application of restraints or sensory deprivation undertaken as a reasonable operational security measure, such as temporarily blindfolding a detainee to protect the identity of specified individuals (among others: special forces, intelligence personnel, other detainees, interpreters) or to prevent the detainee from seeing sensitive information, will not amount to ill treatment. If the application of restraints or the deprivation of sight or hearing is undertaken, this should stop immediately when the reason for it no longer applies.

3.4 Holding facility.

3.4.1 General.

The requirement for a holding facility should be addressed in the SOPs or OPORD. Depending upon the nature of the international military operation and the number of detainees, additional holding facilities may be required. The personnel and material requirement, such as camp staff, guard force and building material should already be identified during the operational planning process.

The standard of the holding facility may depend on a number of factors including the nature of the international military operation and the theatre and the resources available. However, minimum standards for the holding facility should include:

- 1) Adequate accommodation and bedding;
- 2) Protection against the dangers of military activities;
- 3) Ablutions and toilet facilities;
- 4) Regular provision of adequate food and water;
- 5) Segregation between men and women, while keeping any family units together;
- 6) Medical assistance;
- 7) Access to fresh air and natural light;
- 8) Opportunity for religious observance;
- 9) Opportunity to exercise;
- 10) Waste disposal.
- 11) To adequately store and preserve possessions removed from detainees.

3.4.2 Deprivation of sight or hearing.

If deprivation of sight or hearing and the application of restraints are necessary in the holding facility, the same considerations apply as during evacuation (See 3.3.2).

3.4.3 In-processing

3.4.3.1 Registration.

The detainees' preliminary registration documents should be checked. As a minimum, the registration record for each detainee should contain as much information as

required to positively identify the detainee, locate where the detainee is being held and the authority responsible for that detainee.

3.4.3.2 Medical examination.

A medical examination is to be performed by suitably qualified medical personnel confirming the medical condition of the detainee upon entry into the detention facility and to ensure that wounded and sick detainees receive appropriate treatment for their conditions.

3.4.4 Initial review.

A prompt initial review by an impartial and objective authority to determine the lawfulness and appropriateness of detention should be carried out. The authority must be objective and impartial but not necessarily outside the military. Although there is no requirement for the authority to be a judge or lawyer, he or she should be supported by a legal advisor. The authority must have sufficient information available to make an assessment of the legality and propriety of continued detention and must consider both the legal and factual basis for detention. The authority must also be able to evaluate the relevant information and make relevant conclusions such as whether the detainee continues to constitute a threat to security.

3.4.5 Information.

In non-international armed conflicts and where warranted in other situations, the detaining authority is to inform the ICRC of the detention of an individual. In non-international armed conflicts, the ICRC may offer its services to the parties of the conflicts. Where practicable, the detainee's family is to be informed.

3.4.6 Interrogation and Criminal Investigation.

Only qualified and trained personnel are to carry out any tactical questioning and interrogation, and only authorised (law enforcement) personnel may carry out any mandated criminal investigations. Consideration should be given for the possible need for interpretation during questioning or interrogations.

3.4.7 Minimum rights of the detainees in the holding facility:

- 1) Possibility to file a complaint either oral or written. All complaints are to be reviewed and, if based on credible information, be investigated by the detaining authority;
- 2) Assistance of an interpreter if necessary;
- 3) Appropriate contacts with the outside world, including the family as soon as reasonably practicable. Such contact is subject to reasonable

conditions relating to maintaining security and good order in the detention facility and other security considerations;

4) There is no provision requiring access by the ICRC to detainees in non-international armed conflicts. In non-international armed conflicts, the ICRC may offer its services to the parties of the conflict with a view to visiting persons deprived of their liberty.

3.4.8 Periodic review.

Periodic reviews by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention should be carried out. Review should occur as often as necessary, at a minimum every six months.

3.4.9 Death.

A medical officer is to certify death. Every death of a detainee is to be investigated by the appropriate authorities. The body should be treated with respect. If it is impossible or not reasonably practical to return the body to the family or Host Nation authorities, appropriate funeral arrangements are to be made.

IV. TRANSFER OR RELEASE

A detainee should be transferred or released as soon as practicable.

4.1 Transfer

4.1.1 General.

1) Transfer refers to situations where a detainee is physically handed over to the custody of another State or judicial tribunal. There might be different reasons for transfer such as for medical treatment or because a holding facility is reaching capacity. In addition, detainees who are accused of criminal offences need to be handed over as soon as possible to the proper judicial authorities for prosecution by the Host Nation or extradition.

2) It is important to ensure that a detainee who is to be transferred is not subject to a real risk of violation of international law obligations concerning humane treatment and due process. For example, a detainee is not to be transferred where there are substantial grounds for believing that the detainee would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.

3) The commander should ensure that national guidelines or instructions from the chain of command as to the procedures with regards to transfer either to another State or organisation are followed.

4.1.2 Out-processing:

1) A medical examination of the detainee should be carried out in order to confirm their medical condition at that point. If the detainee is receiving medical treatment, then the medical file dealing with this must accompany him.

2) The belongings that were removed from the detainee and the related record should also accompany the detainee on his transfer.

3) Depending upon the length of the journey to be undertaken, the same consideration applies as for the evacuation phase as to whether food, water and transport must be provided.

4) With regard to deprivation of sight or hearing and the application of restraints, the same considerations apply as during the evacuation phase (See para 3.3.2).

5) The transfer of the detainee is to be registered in the detention facility's registration documents relating to that detainee.

6) Information. In non-international armed conflicts and where warranted in other situations, the detaining authority is to inform the ICRC of the transfer of an individual. Where practicable, the detainee's family is to be informed.

4.2 Release

4.2.1 General.

1) When the justification for deprivation of a person's liberty no longer applies, the person will be released.

2) The commander should ensure that national guidelines or instructions from the chain of command as to the procedures with regards to release of detainees are followed.

4.2.2 Out-processing:

1) A medical examination of the detainee should be carried out in order to confirm their medical condition at that point. If the detainee is receiving

medical treatment, then the medical notes dealing with this should be provided to him.

- 2) The personal belongings that were removed from the detainee and the related record should also be provided to him.
- 3) With the view to minimizing the resultant risk to the detainee, consideration should be given to the time of release and appropriate release point.
- 4) Depending upon the length of the journey to be undertaken, the same consideration applies as for the evacuation phase as to whether food, water and transport must be provided.
- 5) With regard to deprivation of sight or hearing and the application of restraints, the same considerations apply as during the evacuation phase (See para 3.3.2).
- 6) The release of the detainee is to be registered in the detention facility's registration documents relating to that detainee.
- 7) Information. In non-international armed conflicts and where warranted in other situations, the detaining authority is to inform the ICRC of the release of an individual.

CONCLUSION

During the course of international military operations, individuals can be captured and detained in accordance with the applicable mandate. In any case and regardless of their status under international law, detainees should be treated humanely at all times and in all circumstances. These fundamental standards apply in all the phases of the detention process that is to say from the initial point of capture until transfer or release. All military personnel should understand and apply the standards of treatment specified in this document. Commanders must ensure that all personnel are aware of their obligations and take the necessary and reasonable measures to prevent or repress the commission of crimes when they know or have reason to know that subordinates are about to commit or are committing such crimes. This requirement includes proper planning. It is essential that detention activities must be integrated in the operational planning process. From the outset of the operation, commanders should plan how to deal with individuals captured in the theatre of operations when conducting international military operations.

The proper treatment of detainees is essential in terms of the legitimacy of the operation. This document contains best practices, setting out guidance for the military decision makers and the principles that apply at the tactical level. It is not meant as a repetition of the Geneva Conventions or other related international law documents, but represents a toolbox that military commanders may use during the preparation and the execution phases of international military operations.